

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Samuel J. Bourne, Individually
and as Trustee of Bedrock Realty Trust

v.

No. 05-cv-365-JD
Opinion No. 2007 DNH 038

Town of Madison, et al.

O R D E R

This case involves a land use dispute between Samuel J. Bourne and the town of Madison, New Hampshire, its board of selectmen, the individual members of the board, and Robert D. King, who allegedly served as an unauthorized alternate on a town committee. Bourne alleges constitutional violations and violations of New Hampshire law. The parties have been engaged in a contentious discovery process for the past year. On January 8, 2007, the court granted Bourne's motion to compel the production of documents. The defendants now move for a protective order or for reconsideration of that order. Bourne objects and moves the court to hold defendants in contempt.

Background

On March 9, 2006, Bourne served the defendants with a request for documents. The defendants produced some of the

requested documents, but objected to two specific requests.¹ Request fourteen asked for all "fax letter/memoranda and letters from/to Robert King and the Board, as well as from/to Roger Cyr and the Board, which refer, relate, or evidence in any way [the property in dispute]."¹ Request nineteen asked for any documents "which refer, relate, or evidence in any way the petition by one or more property owners in the Town requesting the Board to commence a formal layout procedure under statutory authority of the [property in dispute] and proceedings resulting therefrom."¹ The defendants responded that request fourteen sought attorney work product and documents protected by the attorney-client privilege. Additionally, the defendants contended that compliance with either request would be unduly burdensome because the same documents had already been provided to Bourne in a related state case.

On October 31, 2006, Bourne filed a motion to compel the production of the disputed documents arguing that the defendants had failed to establish the applicability of the attorney-client privilege. Bourne noted that neither Cyr nor King nor any of the selectmen are attorneys. To the extent that the selectmen shared privileged information with King or Cyr, Bourne argued, the

¹The defendants initially objected to a third request, but they have since produced those documents.

attorney-client privilege was waived by disclosure to a third party. Finally, Bourne argued that the defendants' claims that King's communications to the selectmen were made at the behest of town counsel and that King was effectively acting as a town official were not supported by the record.

The court agreed, finding that the defendants "failed to demonstrate that the [requested] documents . . . are privileged nor have they provided sufficient reason for not producing said documents." January 8, 2006 Order (document no. 55). The court granted the motion to compel and ordered the defendants to produce the relevant documents by January 19, 2007.

Although Bourne received a production of documents on January 19, many of the documents were heavily redacted.² The outside counsel representing the town in this case (and in the related state case) provided a cover letter explaining his decision to withhold "direct communications with me or Town Counsel subsequent to the filing of the federal action. . . . I have produced the to/from, dates, and re lines of these documents in lieu of a privilege log."

²The defendants claim that sixty-four pages were redacted in whole or in part. Bourne contends that eighty pages were redacted, fifty-two of which were redacted in their entirety.

On January 24, the defendants moved for a protective order or for reconsideration of the January 8 order. Bourne objected and moved the court to hold the defendants in contempt.

I. Defendants' Motion for Protective Order or to Reconsider

The defendants want a protective order to prevent Bourne from obtaining documents allegedly protected by the attorney-client privilege. In the alternative, they ask the court to reconsider the January 8 order compelling discovery and they invite the court to conduct an in camera review of the disputed documents. The defendants maintain they complied with the January 8 order by producing all communications between Cyr and the selectmen and all communications between King and the selectmen. Those documents were produced without redaction, except for communications between King and the selectmen that (1) occurred after the initiation of the present lawsuit, and (2) were communicated directly to either town counsel or the town's outside counsel who is representing the defendants in this suit. The production of redacted documents was intended to give Bourne fair notice of the documents withheld on attorney-client privilege grounds.

The defendants are a dime short and a day (or more) late. First, the defendants cannot ask for an order protecting from

discovery the very documents that the court has already ordered the defendants to produce. The defendants could have requested a protective order earlier in the discovery process and they also had an opportunity to substantiate their privilege claims in objecting to Bourne's motion to compel. They failed to do either.

Second, the defendants' request for reconsideration of the January 8 order is also late. Under the local rules, a motion to reconsider an interlocutory order of the court "shall be filed within ten (10) days from the date of the order unless the party seeking reconsideration shows cause for not filing within that time." LR 7.2(e). That deadline expired on January 23, 2007, a day before the defendants moved for reconsideration. The defendants' motion provides no basis to excuse the late filing.

More importantly, the court ordered compliance with its discovery order by January 19. To avoid violating that order, the defendants should have moved for reconsideration in advance of January 19 and asked for, at a minimum, an extension of the deadline. The defendants violated the discovery order by failing to produce, by January 19, all documents responsive to requests fourteen and nineteen. They cannot retroactively cure that violation by subsequently filing a motion for reconsideration.

Even if the court treated the defendants' motion for reconsideration as timely, it would fail on the merits. The defendants' motion does not "demonstrate that the order was based on a manifest error of fact or law." LR 7.2(e). The court granted the motion to compel because it found that the defendants had failed to demonstrate any valid basis for withholding the requested documents. The defendants' present motion fails to demonstrate how that finding was erroneous.

The Federal Rules of Civil Procedure provide broadly that parties "may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party" Fed. R. Civ. P. 26(b)(1). A party that seeks to resist discovery based on privilege must "make the claim expressly and . . . describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Fed. R. Civ. P. 26(b)(5). Thus, the party seeking to avoid a discovery obligation based on a privilege bears the burden of establishing its applicability. See Cook v. CTC Commc'n Corp., Civ. No. 06-058, 2006 WL 3313838, at *2 (D.N.H. 2006); cf. In re Keeper of Records, 348 F.3d 16, 22 (1st Cir. 2003) (party resisting a grand jury subpoena on

attorney-client privilege grounds "bears the burden of establishing that it applies to the communications at issue and that it has not been waived").

The Federal Rules do not dictate the precise timing or form of the Rule 26(b)(5) description. As this court has previously noted, "[t]he scope of the description necessary to satisfy Rule 26(b)(5) need only be so broad as to permit [an] assessment [as to the applicability of the privilege]." Emerson Elec. Co. v. Ouellette, Civ. No. 96-364, 1998 WL 34088465, at *7 (D.N.H. 1998). The timing of the "duty to provide the description required by Rule 26(b)(5) is flexible and does not arise until there is a good faith challenge to the privilege claim." Id. at *8 (quotation marks and citation omitted). See also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for the Dist. of Mont., 408 F.3d 1142, 1149 (9th Cir. 2005) (declining to adopt per se rule that would deem "a privilege waived if a privilege log is not produced within Rule 34's 30-day time limit").³

Whatever the precise contours of the Rule 26(b)(5) notice requirements, the defendants did not meet them here. Although a privilege log describing each individual document may not be

³Rule 34 requires that a party served with a document request must respond in writing within 30 days. Fed. R. Civ. P. 34. A response that objects to the disclosure of any documents must state the reasons for the objection. Id.

necessary in every case, see Fed. R. Civ. P. 26 advisory committee notes (1993 amendments) (providing that a categorical description of privileged documents may suffice when the privileged documents are voluminous), this court has rejected the use of blanket privilege assertions. See Emerson, 1998 WL 34088465, at *7; see also Burlington, 408 F.3d at 1149 ("boilerplate objections or blanket refusals . . . are insufficient to assert a privilege"). In Emerson, the court ruled that where the party seeking disclosure had conceded that the requested documents were privileged and was only asking the court to hold that "the privilege-holder ha[d] waived the privilege as to a whole category of materials," the opposing party's broad assertion "that the privilege protects various categories of documents . . . satisf[ied] Rule 26(b)(5) until such time as the court decides the waiver issue." Emerson, 1998 WL 34088465, at *7.

Here, unlike Emerson, Bourne has never conceded that the documents at issue are privileged. The defendants were therefore required, at least as of the time they filed their objection to the motion to compel, to "provide sufficient information to enable [the plaintiff or this court] to evaluate the applicability of the claimed privilege or protection." Fed. R. Civ. P. 26 advisory committee notes (1993 amendments). The

defendants' most recent production of redacted documents might have been sufficient to satisfy Rule 26(b)(5) had it been timely. Unfortunately, it was not provided until after the court ordered production.⁴

Finally, the court remains unpersuaded by the defendants' argument that the production of documents responsive to requests fourteen and nineteen would be unduly burdensome because Bourne had already obtained these documents through discovery in the related state case. The court cannot verify the accuracy of that claim, but in any event, it hardly supports the defendants' argument. If many of the requested documents have already been produced to Bourne in another case, it should not be difficult to undertake a second production, particularly where, as here, the universe of documents is relatively small. Cf. Burlington, 408

⁴The defendants' objection to Bourne's motion to compel failed to substantiate the claim that King acted as town counsel's legal assistant and that his memoranda were composed at the direction of counsel. Rather than cure that deficiency, the defendants switch tracks in the motion to reconsider. They now argue that because King, the town, and the selectmen are co-defendants, the "common interest doctrine" provides that King should be treated as a "client" of town counsel for attorney-client privilege purposes. See Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002). But in Cavallaro, the First Circuit recognized that the common interest doctrine is merely an exception to the third-party waiver rule, not an independent basis for the privilege. Id. at 250. In any event, the court will not consider a new legal theory on a motion to reconsider.

F.3d at 1149 ("The claim that responding in a timely fashion would have been impossible or overly burdensome is hard to justify, especially because the record reveals . . . that many of the same documents were previously produced in a prior lawsuit.").

II. Plaintiff's Motion for Contempt

Bourne asks the court to order the immediate production of the requested documents regardless of privilege. Bourne also requests an award of the attorneys' fees incurred as a consequence of filing a motion to compel, opposing the defendants' motion for a protective order, and filing the present motion for contempt.

The advisory committee notes to Rule 26 provide that, withholding materials without the proper Rule 26(b)(5) notice, "subjects the [withholding] party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection." Moreover, as noted above, the defendants' unilateral redaction of responsive documents was not permitted by the court's January 8 order. The defendants' refusal to comply with a court order provides an independent basis for a contempt finding. See Fed. R. Civ. P. 37(b)(2)(D); see also Public Serv. Co. of N.H. v. Portland Natural Gas, 218 F.R.D. 361, 362 n.2

(D.N.H. 2003) (noting that "a failure to respond to interrogatories is not punishable as a contempt of court unless the responding party refuses to comply with an order compelling it to respond").

Among other things, Rule 37(b)(2) permits the court to issue an order "refusing to allow the disobedient party to support or oppose designated claims or defenses." Fed. R. Civ. P. 37(b)(2)(B). The rule also mandates an award of reasonable expenses and attorneys' fees caused by the disobedient party's failure to comply, "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2).

In light of the waste of time and resources caused by the defendants' unjustified discovery tactics, the court grants Bourne's motion for contempt. The defendants are ordered to produce, no later than April 4, 2007, all documents without redaction that are responsive to requests fourteen and nineteen. The court deems as waived any claim of privilege that may have applied to any of those documents that were created before October 31, 2006 (the date that Bourne filed his motion to compel). To the extent that there are responsive documents that the defendants believe are privileged and that post-date October

31, 2006, the defendants should produce a compliant Rule 26(b)(5) notice describing those documents.

Bourne is also entitled to reasonable attorneys' fees and expenses. The court could have awarded attorneys' fees and expenses when it granted Bourne's motion to compel. See Fed. R. Civ. P. 37(a)(4)(A). Because the defendants' privilege claims were colorable, the court found such a sanction unjust. In light of the defendants' continued delaying tactics and failure to obey a court order, the court reconsiders that decision and orders the defendants to pay the reasonable attorneys' fees and expenses necessitated by (1) Bourne's motion to compel, (2) his objection to the defendants' motion for a protective order or for reconsideration, and (3) his motion for contempt. Bourne may file a bill of costs in accordance with Local Rule 54.1 within twenty days of the date of this order. The defendants can object as provided in Local Rule 54.1(c).

Conclusion

The defendants' motion for a protective order or for reconsideration (document no. 71) is denied. The plaintiff's motion for contempt (document no. 73) is granted. The defendants are ordered to produce the disputed documents no later than April 4, 2007. The plaintiff's request for reasonable attorneys' fees

and costs is granted provided that the plaintiff files a full accounting of the relevant fees and costs within twenty days of the date of this order and subject to the court's review for reasonableness.

SO ORDERED.



Joseph A. DiClerico, Jr.
United States District Judge

March 27, 2007

cc: Catherine M. Costanzo, Esquire
Brian J.S. Cullen, Esquire
Rachel A. Hampe, Esquire
Richard D. Sager, Esquire
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